No. 83-332

In the Supreme Court of the United States

OCTOBER TERM, 1983

COUNTY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in concluding that petitioner's refusal to hire any persons older than 35 for certain positions violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 706 F.2d 1039. The opinion of the district court (Pet. App. 11-20) is reported at 526 F. Supp. 1135.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1983. The petition for a writ of certiorari was filed on August 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner refuses to consider any applicant over 35 years of age for the position of deputy sheriff or helicopter pilot in its county fire department (Pet. App. 1). The Equal Employment Opportunity Commission brought this action in the United States District Court for the Central District

of California to challenge petitioner's policy under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. V) 621 *et seq.*, which generally prohibits employers from discriminating against employees or potential employees on the basis of age. See *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 1.

After a trial, the district court entered judgment (Pet. App. 21-23) for the Commission. The court first rejected petitioner's contentions that Congress could not constitutionally apply the ADEA to states and their subdivisions (*id.* at 12-13) —this Court subsequently rejected a similar contention in *EEOC* v. *Wyoming, supra* — and that Congress, by permitting federal agencies to establish maximum hiring ages for federal law enforcement officers and firefighters (see 5 U.S.C. 3307(d)) had validated age restrictions like petitioner's (Pet. App. 13-14).

The court then noted that, as petitioner conceded, petitioner's only other defense to the claim that its policy violated the ADEA was that age is a bona fide occupational qualification (BFOQ) for the positions in question. The ADEA provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). The district court ruled that the Commission had the burden of proving that age was not a BFOQ. Pet. App. 14-15.

The court held, however, that the Commission had made the necessary showing (Pet. App. 15-20). The court acknowledged that "these jobs are physically arduous and require strength, agility, [and] good reflexes * * *." And the court recognized that younger persons generally are more likely to possess the necessary characteristics than older persons. But the court found that "the record establishes that there is

no strict relationship between age and physical ability. * * * Indeed, many persons over the age of forty possess the physical strength, agility and other characteristics needed for these jobs, while many persons under the age of forty lack these characteristics." In addition, the court found that "[t]he evidence also shows that persons lacking such characteristics may easily be distinguished from those possessing them by the use of simple, inexpensive, and extremely reliable physical performance tests." *Id.* at 16.

The court also remarked (Pet. App. 15-16):

> [A]s [petitioner] concedes, qualified persons hired for these positions before they reach the age of thirty five are able to continue satisfactorily well beyond that age. Indeed, [petitioner] currently employs numerous deputy sheriffs over forty years of age. Also, two of the nine helicopter pilots currently employed by [petitioner] are over forty. Given these considerations, the court finds it inexplicable that [petitioner] refuses to consider for employment persons over thirty five years of age who are satisfactorily employed in similar jobs by other government agencies.

The district court then turned to petitioner's contention that its age limitation was a BFOQ because it was needed to ensure that it would not hire persons with asymptomatic, undetected heart disease. The court noted that the evidence showed the rate of such heart disease among 35-year-old persons to be approximately 3%. But, the court found, simple tests that are "inexpensive and easy to administer" will detect "52 percent of all asymptomatic sufferers" and 99% of those who will have cardiac difficulty in the short term. The court accordingly concluded that "it is not impractical for [petitioner] to differentiate the qualified from the unqualified applicants" among those over 35, and that "only an extremely small percentage of all persons

currently barred by [petitioner's] age restrictions are likely to have heart disease and go undetected by the available medical tests * * *." Pet. App. 17-18.

Finally, the district court considered petitioner's contention that disapproving its age limitation would "saddle it with an older work force which will more rapidly become unfit for the jobs in issue * * * [thus] result[ing] in [petitioner's] receiving a less than optimal return on the initial training it provides its deputy sheriffs and helicopter pilots" (Pet. App. 18). The court noted that "the evidence showed * * * that physical unfitness for these positions did not follow inexorably from the aging process" (*ibid.*). But the more fundamental objection to petitioner's contention, the court stated, is that " '[t]he argument that the investment in training younger recruits is more likely to be recouped than that in the training of older persons would negate the entire concept of protection against age discrimination' " (*id.* at 19 (citation omitted)).

The court of appeals affirmed (Pet. App. 1-10), endorsing the district court's reasoning and ruling that its findings of fact were not clearly erroneous.

ARGUMENT

Petitioner fails to show that it has anything more than a disagreement with the district court's assessment of the evidence in this particular case. Since the district court's rulings were well founded and were upheld by the court of appeals, further review is not warranted.

1. Petitioner asserts that the courts of appeals have been inconsistent in applying the BFOQ exemption under the ADEA (Pet. 8-9, 16). In fact, the courts of appeals that have considered the BFOQ exception have consistently adopted — in substance and usually in name — the test set out in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which specifies that an age limitation is a BFOQ only

if the limitation is "reasonably necessary * * * to the essence of [the] business" and if the employer has reasonable cause for believing either that substantially all of the persons excluded because of their age would be unable to perform the job safely and efficiently or that it is impractical to make individualized determinations (*id.* at 235-236 (emphasis omitted)). In applying this test, the courts of appeals have consistently examined the facts of the particular case and have generally given deference to the district court's determination of whether the elements of the test are satisfied. See, *e.g.*, *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842, 844-846 (6th Cir. 1982); *Stewart* v. *Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *EEOC* v. *City of St. Paul*, 671 F.2d 1162, 1166-1168 (8th Cir. 1982); *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982); *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977). Compare *Orzel* v. *City of Wauwatosa Fire Department*, 697 F.2d 743, 752-754 (7th Cir. 1983), with *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975). See also *Air Line Pilots Association, International* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 951 (2d Cir. 1983). The case reprinted in petitioner's supplemental filing, *EEOC* v. *University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983), followed precisely this approach. And this is the approach used by both courts below (see Pet. App. 6-7, 10, 14).[1]

Petitioner asserts that different courts have reached different results in cases applying the BFOQ exception to what petitioner considers to be similar jobs (*e.g.*, Pet. 8-9). For

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[1]Indeed, the district court — incorrectly, in our view, and contrary to the rulings of several other courts — placed the burden of proof on the BFOQ question on the EEOC, even though the BFOQ exemption furnishes an affirmative defense.

example, some courts have upheld maximum hiring ages for certain law enforcement positions. See Pet. 9 n.7, 16. Compare *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d at 306-309 (holding that a maximum hiring age for airline pilots is not a BFOQ) with *Murnane* v. *American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982) (upholding maximum hiring age for pilots). But this is not a conflict warranting this Court's review; it is simply the inevitable result whenever different courts apply a standard that depends heavily on the facts of each case, especially if those facts and the evidentiary showings vary somewhat from case to case. In fact, Congress specifically envisioned that the BFOQ exception would be applied in this fashion (H.R. Rep. 805, 90th Cong., 1st Sess. 7 (1967)):

> The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.

Indeed, petitioner fails to explain how this Court could possibly resolve such "conflicts." In order to do so, the Court would presumably have to review evidence about the nature of various jobs, presented by all parties who might be interested, and issue a detailed scheduled specifying the age restrictions that are permissible in each category of jobs. But that is a task for a legislature or an administrative agency, not a court.

2. Petitioner also complains of the fact that Congress, in 5 U.S.C. 3307(d), has authorized the establishment of a maximum hiring age for certain federal law enforcement officers; indeed, petitioner suggests that this may even amount to a violation of the Constitution (see Pet. 8, 11-19). But the Constitution does not require Congress to treat

federal employees in the same way as the employees of state governments or other persons. See *EEOC* v. *Wyoming*, slip op. 15 n.17. Moreover, the same Congress that enacted 5 U.S.C. 3307(d) also extended the ADEA to the states; had that Congress wanted to exempt state law enforcement officers from the requirements of the ADEA, it was fully capable of making its intentions explicit. Congress has treated federal employees differently from other employees with respect to other aspects of the ADEA. See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (jury trials not available to federal employees suing under ADEA). We note that the courts of appeals have consistently rejected arguments like petitioner's. See *Orzel* v. *City of Wauwatosa Fire Department*, 697 F.2d at 750-751 (statutory retirement age of 55 for federal firefighters has no bearing on BFOQ exemption for city jobs); *Tuohy* v. *Ford Motor Co.*, 675 F.2d at 845 (FAA mandatory retirement age for commercial airline pilots does not establish BFOQ for non-commercial pilots).[2]

3. Finally, petitioner suggests that other courts have allowed employers to justify age discrimination on the ground that young employees will remain in their employ longer, thus giving the employer a greater return on its investment in their training (see Pet. 8-10, 19-22). Both courts below rejected this contention, reasoning that it

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[2]Petitioner relies (Pet. 8-9, 14-16) on *Stewart* v. *Smith*, 673 F.2d 485 (D.C. Cir. 1982); *Thomas* v. *United States Postal Inspection Service*, 647 F.2d 1035 (10th Cir. 1981); and *Bowman* v. *United States Department of Justice*, 510 F. Supp. 1183 (E.D. Va. 1981). None of these cases dealt with alleged violations of the ADEA by states or private employers. *Stewart* and *Bowman* held that specific federal statutes authorizing or establishing age limitations on federal employment were not superseded by the ADEA. See 673 F.2d at 493-494; 510 F. Supp. at 1186. *Thomas* sustained the constitutionality of a federal age limitation. Plainly none of these cases aids petitioner.

would effectively nullify the ADEA. Contrary to petitioner's suggestion, every other court of appeals that has considered a similar argument has agreed with the courts below, and their conclusion is plainly correct. See *Orzel* v. *City of Wauwatosa Fire Department*, 697 F.2d at 755; *Air Line Pilots Association, International* v. *Trans World Airlines, Inc.*, 713 F.2d at 949 n.11; *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d at 307. Cf. *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 716 (1978) (cost justification defense not available under Title VII).

Petitioner relies (Pet. App. 9-10, 22) on *Murnane* v. *American Airlines, Inc.*, *supra*, and *Hodgson* v. *Greyhound Lines, Inc.*, *supra*. But the employer's justification sustained in those cases was unlike any contention petitioner has made here. There the employers showed that a maximum hiring age was a BFOQ because employees who had had more experience were substantially safer; if the employer were forced to hire older persons, they would never gain sufficient experience, and the safe operation of the employer's business would be jeopardized. See 667 F.2d at 101; 449 F.2d at 863.[3] Petitioner has made no such showing or contention here; and in view of the district court's finding (Pet. App. 17-18) that petitioner can distinguish those applicants who can perform the jobs safely from others on an individualized basis without using age as a proxy, such an argument would be foreclosed.

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[3]The court in *Murnane* also remarked that an otherwise valid BFOQ defense does not become invalid because the age limitation also yields collateral economic benefit to the employer. 667 F.2d at 101 n.6. This is far from saying, as petitioner contends, that any age limitation that economically benefits an employer is therefore a BFOQ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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